

An appeal

- by -

Ascension Consulting Inc. operating as
Ascension Computer Services and i-Contact
("Ascension")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: C.L. Roberts

FILE No.: 2005A/170

DATE OF DECISION: November 2, 2005

DECISION

SUBMISSIONS

Duncan Eades	on behalf of Ascension Consulting Inc.
Paul Harvey	on behalf of the Director of Employment Standards
Landon Bradley	on his own behalf

OVERVIEW

1. This is an appeal by Ascension Consulting Inc. (“Ascension”), pursuant to Section 112 of the *Employment Standards Act* (“the Act”), against a Determination of the Director of Employment Standards (“the Director”) issued August 12, 2005.
2. Landon Bradley worked as a software salesman for Ascension, a computer repair, software sales and service business, from May 14, 2004 until he quit on December 6, 2004. Mr. Bradley filed a complaint alleging that he was owed regular wages, annual vacation pay and statutory holiday pay.
3. The Director’s delegate investigated the complaint as Ascension had ceased operating.
4. The delegate determined that Ascension had contravened Sections 17 and 18 of the *Employment Standards Act*, and section 46 of the *Employment Standards Regulation* in failing to pay Mr. Bradley wages and vacation pay. He concluded that Mr. Bradley was entitled to wages and interest in the total amount of \$2,416.43. The delegate also imposed a \$1,500 penalty on Ascension for the contraventions of the Act, pursuant to section 29(1) of the *Employment Standards Regulation*.
5. The delegate was unable to find, on the evidence, that Mr. Bradley was entitled to statutory holiday pay.
6. Ascension contends that the delegate erred in law in finding that the employer is Ascension Consulting, and in finding Mr. Bradley to be an employee rather than a contractor.
7. This appeal is decided on the written submissions of the parties.

ISSUE

8. Whether the delegate erred in concluding
 - a) that Mr. Bradley was an employee rather than a self employed contractor; and
 - b) that Ascension Consulting was the employer.

THE FACTS AND ARGUMENT

9. Mr. Bradley worked a total of 19.50 hours each week. Two cheques, payable to Mr. Bradley by Ascension Consulting Inc., one dated August 22, 2004, the other dated November 17, 2004, were returned N.S.F. In addition to the N.S.F. cheques, Mr. Bradley contended that he was owed wages from October 16 to December 6. He said that he quit as a result of Ascension's failure to pay his wages.
10. Mr. Eades contended that Mr. Bradley worked for Connect Consulting Inc. operating as I-Connect ("Connect"), and that he was not an employee. He also contended that payments to Mr. Bradley were shared between Ascension and Connect.
11. Mr. Eades conceded that Mr. Bradley had not been fully paid, but neither disputed nor confirmed the amounts claimed. He also acknowledged that the company was no longer in business, and that the operating name of the former store location was Ascension Consulting Inc.
12. The delegate concluded that Mr. Bradley was an employee. He found that Mr. Bradley had no investment in Ascension, and was hired, controlled and supervised by Mr. Eades. He also found that Mr. Bradley performed work normally performed by an employee. While he noted Mr. Eades' contention that Mr. Bradley was a consultant, he found no evidence to support this position.
13. The delegate also determined that, although Mr. Eades contended that Mr. Bradley's compensation was shared by two companies, there was no evidence provided to support this contention. The delegate noted that Mr. Bradley's cheques were issued in the name of Ascension, and that Mr. Bradley knew little of Connect. Further, the delegate noted that, during his investigation of the company, there was no connection between Connect and the store location, and no evidence that was registered with the Registrar of Companies. The delegate determined that Mr. Eades was Ascension's sole director/officer, and the owner/operator of the business.
14. The delegate noted that Mr. Eades had several opportunities to provide him with the necessary information supporting his position, but failed to do so. The delegate indicated that he had left messages for Mr. Eades, had one telephone conversation with him, and received no reply to a subsequent email. Further, the delegate noted that Mr. Eades had not responded to a Demand for Employer Records issued March 10, 2005 or a final letter seeking a response by August 6, 2005.
15. In the absence of any evidence to the contrary, the delegate determined that Mr. Bradley was an employee and that his employer was Ascension. Wages were determined owing as set out above.

Argument

16. Mr. Eades contended that the Determination was "directed at the incorrect Corporation". He also contended that Mr. Bradley was hired as a contractor and not as an employee. Mr. Eades supplied a Certificate of Incorporation for Connect Consulting Inc. dated January 23, 2004 with his appeal documents. Also attached was a Register of Members for Connect Consulting Inc. showing Duncan Eades to be a Director and shareholder of 90% of the shares.
17. The delegate submits that the evidence supports the Determination, and that the appeal should be dismissed.

18. Mr. Bradley also seeks to have the Determination upheld.

ANALYSIS AND DECISION

19. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

a) the director erred in law

...

20. The burden of establishing the grounds for an appeal rests with an Appellant. Ascension must provide persuasive and compelling evidence that there were errors of law in the Determination as alleged.

21. The Tribunal has consistently said that an appeal is not a re-investigation of the complaint nor is it intended to be simply an opportunity to re-argue positions taken during the hearing. Further, the Tribunal will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process. In *Tri-West Tractor Ltd.* (BC EST #D268/96), the Tribunal held that it would not allow appellants to “sit in the weeds”, failing or refusing to cooperate with the delegate during an investigation and then later file appeal of the Determination when they disagreed with it.

22. Although Mr. Eades makes several arguments in his appeal documents, those arguments merely repeat those made to the delegate. Not only was there no evidence supporting those arguments before the delegate despite repeated efforts by the delegate to obtain them, Mr. Eades provides none on appeal.

23. In the absence of any evidence supporting the ground of appeal, I find no basis to set the Determination aside.

ORDER

24. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated August 12, 2005, be confirmed in the amount of \$3,916.43, plus whatever interest might have accrued since the date of issuance.

C.L. Roberts
Member
Employment Standards Tribunal